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Candace Havens  
Director

## MEMORANDUM

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**DATE:** May 9, 2014

**TO:** Alderman Marcia T. Johnson, Chairman  
Members of the Zoning and Planning Committee

**FROM:** Candace Havens, Director of Planning and Development   
James Freas, Chief Planner, Long-Range Planning

**RE:** #80-13: THE PLANNING DEPARTMENT requesting update discussions of the zoning reform project.

**MEETING DATE:** May 12, 2014

**CC:** Board of Aldermen  
Planning and Development Board  
Donnalyn Kahn, City Solicitor

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Progress on the review of the draft Zoning Ordinance continues with staff conducting a detailed, line-by-line comparison of the old and new zoning ordinance texts and the Zoning Reform Advisory Group providing the critical "second set of eyes" in identifying what works or does not towards the overarching goal of making the existing ordinance a more useable document. Parallel to this review process, there are a number of important decisions relative to key issues proposed in the draft ordinance for which staff is seeking guidance from ZAP before our consultant prepares another draft. In the May 12 Zoning and Planning Committee meeting, staff is seeking guidance on:

1. Use of the word "family" in the Zoning Ordinance
2. Geographic Information System (GIS) data layer as the official Zoning Map
3. Definitions of "Site" and "Lot"

## 1 - Use of the word “family” in the Zoning Ordinance

One of the more frequent challenges inherent to many zoning ordinances is in defining by whom or how a residential dwelling unit may be occupied. The earliest zoning ordinances used the term ‘family’, creating single-family and multi-family zoning districts and relying on the traditional definition of family to indicate who was to live in the homes and buildings of these districts. Over time, that approach has become increasingly problematic as a wide array of legitimate living arrangements are recognized, as allowed and appropriate in what would be termed a single-family house. As a result, a zoning ordinance cannot rely on the traditional definition of “family” and should either provide a different definition for “family” or take another approach to addressing the issue. Newton’s current Zoning Ordinance does not define ‘family’, but addresses the issue through other definitions and standards. Staff proposes for the purpose of clarity, that the word ‘family’ be removed and replaced with ‘dwelling unit’.

In order to be a legitimate exercise of zoning authority, a zoning provision must demonstrate a reasonable relationship between the regulations and the public purpose/goal intended to be achieved by those regulations. In 1974 the Supreme Court ruled that restricting a dwelling to one family is a legitimate use of the police power in order to control population density, traffic, and related issues<sup>1</sup>. In recent years, the interpretation of “family” in this restriction is under increasing challenge as it is found that people may choose to live together in a number of different ways that approximate a “family” in terms of impacts on the surrounding areas with regard to controlling population density. At the same time, since the use of the term ‘family’ as a means of controlling population density, traffic, and related issues was upheld, the courts have recognized that even within the bounds of traditional families there can be wide ranges of living arrangements with large or small numbers of people and even multiple cars per family, bringing the original goal of the regulation into question. The end result of this further analysis by the courts and in practice is that the definition of ‘family’ in zoning has been expanded beyond its traditional sense.

Many courts have taken the approach of interpreting “family” as a “single housekeeping unit.” In the case of *City of White Plains v. Ferraioli*<sup>2</sup>, the New York Court of Appeals invalidated an ordinance that restricted a family to those related by blood or marriage. The court held that a group home met the definition of ‘family’ based on it being a “single housekeeping unit” that was “to all outward appearances, a relatively normal, stable, and permanent family unit” rather than “a temporary living arrangement as would be a group of college students sharing a house” and which did not provide “a framework for transients or transient living.” The same court in *McMinn v. Town of Oyster Bay*<sup>3</sup>, held that an occupancy restriction on single-family housing based on the biological or legal relationships between its inhabitants, rather than the number of its occupants, bears no reasonable relation to the goals of controlling population density, reducing parking and traffic problems, and preventing noise and disturbance.

There are three Massachusetts court cases most pertinent to the issue of the use of ‘family’ in zoning ordinances and, as it happens, two of these involve the City of Newton. A detailed discussion of these

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<sup>1</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)

<sup>2</sup> 34 N.Y.2d 300, (1974)

<sup>3</sup> 66 N.Y.2d 544, (1985)

cases may be found in Appendix A. In short, these cases show that the Massachusetts Appeals Court agrees with the New York Appeals Court in the broad interpretation of “family” as including groups of unrelated people living as a single housekeeping unit.

In addition to the case law cited above finding the term ‘family’ to be more broadly defined than the traditional definition, the Massachusetts legislature has determined in MGL Chapter 40A, section 3, that any land use law distinguishing or otherwise providing different regulatory burdens on any form of congregate living arrangements serving non-related people with disabilities from those imposed on families would constitute illegal discrimination.

Newton’s Zoning Ordinance currently addresses the control of population density, at least as it relates to the occupancy of dwelling units, through three different land uses and their associated definitions. The first of these is “Association of persons” defined as “A group of five or more persons 18 years of age or older, who are unrelated by blood, marriage or adoption living together in a common dwelling.” This land use is only allowed in Single Dwelling Unit and Multi Dwelling Unit residential districts by special permit. The definition approximates that used commonly for the term “family” but creates the allowance for four unrelated people to live together allowing for a reasonable degree of flexibility in keeping with the acceptance of a broader range of living arrangements and the idea that, with regard to the issues of population density that the Zoning Ordinance intends to address, there is little difference between four unrelated people and a family. The second key land use is “Boarding House,” “Rooming House,” and “Lodging House” defined as “any dwelling designed, occupied or intended for occupancy by four or more lodgers.” Lodger is further defined as, “a person who occupies space for living and sleeping purposes without separate cooking facilities, paying rent, which may include an allowance for meals; and who is not a member of the housekeeping unit.” The Boarding House use is only allowed by special permit in the Multi Dwelling Unit residential districts. Together, these two uses clearly preclude any type of situation in which a property owner might seek to rent a dwelling unit to large numbers of unrelated people, at least without receiving a special permit and having conditions imposed to address any potential impacts created.

The final key definition in Newton’s Zoning Ordinance is that of “Dwelling Unit,” which is defined as “One or more rooms forming a habitable unit for one family, with facilities used or intended to be used, in whole or in part, for living, sleeping, cooking, eating, and sanitation.” Once again, this definition makes use of the undefined term “family.” Utilizing the courts’ understanding of this word, as it pertains to zoning, it would likely be clearer to expand the definition such that it reads “family, household or housekeeping unit.” Operating in conjunction, with single or two dwelling unit structures as the base allowed uses in residential districts, and “association of persons” and “boarding houses” as additional uses only allowed by special permit, the intent of the ordinance is clear without the potentially misleading use of the word “family.” As the Zoning Ordinance must be understood in its totality, with all parts considered, a property owner could not argue that a dwelling unit could be occupied by-right by a large number of unrelated people simply because it is no longer called a single family dwelling unit as the requirements of these other land uses would be triggered.

As part of Phase 1 of the Zoning Reform project, staff proposes to replace the word family, as in “Dwelling for one family,” with “Dwelling Unit.” The new use is proposed to read “Single Dwelling Unit, detached. Similarly, “Dwelling for Two Families” would become “Two-Unit Dwelling, detached”, “Single Family attached dwellings” would be “Single Dwelling Unit, attached” and “Multifamily dwelling”

would be “Multi-Unit Dwelling.” With the broadening definition of family recognized by the Massachusetts courts and the anti-discrimination requirements of Chapter 40A, it would seem that the continued use of the word “family” as part of the definition of the land uses allowed in these residential districts is so restrictive as to be misleading. Most people will look at the zoning ordinance through a more traditional understanding of what a family is than the definition created by the courts. As the relevant purpose of Newton’s Zoning Ordinance is to regulate the use of land so as to address issues of population density, regulating the definition of what constitutes a family in Newton would seem inappropriate. Instead, the approach already provided for in the ordinance, utilizing “Association of Persons” and “Boarding Houses” to directly address the issue of concern seems clearer, enforceable, and more in keeping with the intent of the Newton Zoning Ordinance.

## **2 - Geographic Information System (GIS) data layer as the official Zoning Map**

Geographic Information Systems (GIS) is any information system designed to work with geographic data in order to inform decision-making. The key defining factor of GIS data is that it has a geographic component; zoning clearly meets that definition and the City has geocoded (converted the paper map to digital, GIS-enabled data) the Newton zoning map, creating a GIS Data Layer for ease of use in creating maps and performing analysis. Staff is now proposing that this GIS data layer be made the official Zoning Map so as to improve the reliability and useability of the map, both for staff and the general public, and to improve our ability to store, maintain, and track changes over time.

The State Zoning enabling act requires the creation of an official zoning map as a part of the Zoning Ordinance but does not require that it be a paper map. Further, state law only requires that a “true copy” of the map be kept in the Clerk’s Office, not the official map itself (if the digital copy was the official map, a true copy could be created simply by pressing ‘print’). The current Newton Zoning Map was created in 1953 and is maintained and updated as best as can be as a paper map. Some of the challenges presented by the current map include:

- The paper itself is torn, tattered, and faded in places.
- Amendments to the map are necessarily on different sheets of paper requiring a search of multiple pages to determine the zoning of a lot.
- Lot lines, roads, and other features of the base map have changed since 1953 making orientation difficult at times.

The City has already created a Zoning GIS Data Layer, which is used for the vast majority of zoning related questions. This data layer is not considered the official map though, requiring that the old maps still be consulted for final determination of zoning of a given piece of property. In current practice, an amendment to the ordinance is generated using GIS and then printed for inclusion with the paper zoning ordinance. The advantages of making the GIS Data Layer the official map include:

- Staff, residents, and businesses would no longer need to consult the paper maps for final confirmation of the zoning on a property. As they currently are, these maps would be available online.
- More accurate record-keeping of past and future amendments would be possible as this information would become part of the information contained in the data layer.
- The data layer is more easily maintained than the current map, which is beginning to crumble and become illegible.

From a data integrity standpoint, a digital map is easily protected from intentional or unintentional unauthorized alteration. The data file can be password protected such that only an authorized person can alter the base data – this is currently true of all the City’s GIS data layers.

Making the Zoning GIS Data Layer the official zoning map constitutes a substantive change, but one appropriate to the goal of clarifying and modernizing Newton’s Zoning Ordinance. Once approved, staff would need to begin a process of verifying the GIS data layer in order to ensure that it represents a true copy of the Board’s Zoning Map amendments utilizing the existing official map and archives of past Board actions.

## Proposed Text

### 1.3.2. Official Zoning Map

A. The districts are indicated on the plans entitled “City of Newton, Massachusetts, Amendments to Zoning Plans,” adopted July 21, 1951, as amended from time to time, signed by the City Engineer , and these plans and all explanatory matter on the plans are hereby made a part of this Chapter. All amendments of zoning plans adopted since July 21, 1951, however styled, shall be deemed to be amendments of such 1951 plans.

B. The location and boundaries of zoning districts established by this Chapter are also shown and maintained as part of the City’s Geographic Information System (GIS).

C. The Zoning GIS layer constitutes the City of Newton’s Official Zoning Map and is part of this Chapter. All notations, references and other information shown shall have the same force and effect as if fully set forth or described in this Chapter.

D. Upon amendment by the Board of Aldermen, per section 8.2, the Director of Planning and Development is authorized to revise the Official Zoning Map. No unauthorized person may alter or modify the Official Zoning Map.

E. The City must maintain digital and printed copies of the Official Zoning Map and maintain records of superseded official maps. All changes to the Official Zoning Map shall be identified by updating the original computer digital data of each change, together with the date of the change.

F. A hard copy of the data and changes to the data will be kept by the Engineering Department; all revisions to hard copies will be numbered, dated and signed by the Director of Planning and Development.

### 3 - Definitions of “Site” and “Lot”

Newton’s current zoning ordinance does not define the term “lot” which, as one of the basic units of land use regulation, is a very important term. The current ordinance also lacks a definition for “site,” another important term in certain regulatory situations where it must be distinguished from a “lot.” Both definitions are proposed for inclusion in the reformatted zoning ordinance for the purpose of clarity. The question was raised as to how these terms were intended to be used and how they might affect other parts of the existing ordinance.

Basically, a lot is the single piece of land or property that a person owns, whether it is their intention to live there, rent the property to someone else, or develop the property. A lot is legally defined in a deed. Owning a lot does not necessarily entitle one to the right to develop that lot. A “site” is one or more lots controlled by one entity or person assembled or acquired specifically for the purpose of development. Site becomes an important term where the ordinance is clearly intending to regulate future development that might occur on one or more assembled lots such as the Open Space Preservation District. In those situations, it is important to be able to differentiate between those requirements that apply to the entire site as opposed to those applying to an individual lot within or created as a part of the development. Again, the fact that one has property that might constitute a site by the definition in no way imparts the right to develop that property.

#### 1.5.2. Site

**A. Defined.** A site is any lot or group of contiguous lots owned or controlled by the same person or entity, assembled for the purpose of a single development.

#### 1.5.3. Lot

**A. Defined.** A parcel of land either vacant or occupied intended as a unit for the purpose, whether immediate or for the future, of transfer of ownership, or possession, or for development.

## **Appendix A**

In *Commonwealth v. Jaffe*<sup>4</sup> a Newton property owner was renting a house to eight unrelated people and contended that, as the term ‘family’ was undefined in the Newton Zoning Ordinance, the single-family use designation was “void for vagueness.” The Massachusetts Supreme Judicial Court determined the eight unrelated adults living in the house evidenced “a complete lack of communal living”, as evidenced by separate mailboxes and tenancy rights, such that the use of the house was well outside any “reasonable judicial construction” of the word family and thus it was unnecessary to consider the question of a definition of family in the ordinance. The City’s finding of a violation was upheld. However, as evidenced by later cases, if Newton were truly dependent on the word family to define the use of that house, and the eight unrelated persons had shown some degree of communal living, the decision might have gone against the City.

In 1990, the Appeals Court of Massachusetts held that multiple unrelated tenants renting a home in a single-family residential district could constitute a family where the term was undefined in the Town’s zoning ordinance, citing the *Jaffe* case. *Hall v. Zoning Board of Appeals of Edgartown*<sup>5</sup>. The court stated that: “[g]iven contemporary realities, in the absence of a definition of “family” ... the term “single family use” is broad enough to include at least occupancy of a dwelling by a reasonable number of unrelated people who choose to share a single family structure, living together as a single housekeeping unit in a family-like situation.” This ruling established in Massachusetts a broad definition of what could constitute a family; a definition increasingly unlike what might be considered a traditional or dictionary definition relying on relations established by blood or marriage.

As recently as 2011, the Appeals Court upheld Newton in yet another case involving the Jaffe’s. The Jaffe’s had rented each of two units in a two-family house to five unrelated adults without obtaining a special permit. *Jaffe v. City of Newton, et. al.*<sup>6</sup>. In this case, the courts first relied on Newton’s defined use of an “association of persons” (more than four unrelated people living together in a common dwelling). As the five individuals in each unit were clearly unrelated, the use of the structure was clearly an “association of persons” and, as the Jaffe’s had not received the required special permit, the City’s finding of a violation was upheld. The Court then went further, citing the definition of single family use from *Hall*, stated that while the term “family” may extend beyond traditional definitions of blood, marriage and adoption, not all group living arrangements will be viewed as a “family” for zoning purposes: “... in the absence of explanatory provisions in the zoning ordinance, in order to be a ‘family’, the individuals in question must ‘choose to share a single family structure, living together as a single housekeeping unit in a family-like situation.’” Since there was no evidence that the tenants “... took steps to create an intentional family-like situation ... as distinct from simply living as housemates,” they could not be considered a family, which would otherwise be an allowed, by-right use. One could argue though, that the definition of “association of persons” alone was sufficient to support the Court’s decision without relying on use of the term family at all as the use of the structure clearly met that definition, with five unrelated individuals, and therefore could not have been treated as any other use.

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<sup>4</sup> 398 Mass. 50 (1986)

<sup>5</sup> 28 Mass.App.Ct. 249

<sup>6</sup> 80 Mass.App.Ct.1101, (2011) (unpublished decision)